

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
NANTICOKE HOMES, INC.,	)	Chapter 11 Case No.
	)	02-10651 (PJW)
Debtor.	)	
	)	
CONSUMER PROTECTION DIVISION,	)	
OFFICE OF THE ATTORNEY	)	
GENERAL OF THE STATE OF	)	
MARYLAND,	)	
	)	
Appellant,	)	
	)	
v.	)	Civil Action No. 02-1670-SLR
	)	
NANTICOKE HOMES, INC.,	)	
	)	
Appellee.	)	

**MEMORANDUM ORDER**

At Wilmington this 30th day of September, 2003, having reviewed the papers filed in connection with the above captioned appeal;

IT IS ORDERED that the November 8, 2002 order of the United States Bankruptcy Court for the District of Delaware is reversed and the matter remanded for further proceedings,<sup>1</sup> for the reasons that follow:

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<sup>1</sup>(D.I. 8, Ex. 8) The court is operating under the assumption that the appeal has not been mooted by subsequent proceedings, as the parties have not advised the court of such.

1. **Standard of Review.** This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002); In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002).

2. **Background.** Appellant, the Consumer Protection Division of the Office of the Attorney General for the State of Maryland ("the Division"), a state governmental unit charged with enforcing the Maryland Consumer Protection Act and regulating

home builders in Maryland, filed an administrative enforcement action against, inter alia, debtor Nanticoke Homes, Inc.

("Nanticoke"), alleging that Nanticoke violated Maryland's Consumer Protection Act and Custom Home Protection Act in the sale of new homes to Maryland consumers. The enforcement action sought an order against Nanticoke providing for injunctive relief, restitution, civil penalties and costs.

3. In response to notice of the enforcement action, Nanticoke filed a motion seeking a determination from the bankruptcy court that the Division's enforcement action was subject to the automatic stay under 11 U.S.C. § 362(a). After hearing the matter, the bankruptcy court ruled "that the Consumer Protection Division of the State of Maryland can pursue [its enforcement action] against the debtor except it is not entitled to pursue any relief in the form of restitution." (D.I. 7, Ex. 1 at 26-27) The court reasoned that "[d]etermination of claims is a fundamental right and jurisdictional proposition for the bankruptcy court." Because a "main goal" of the enforcement action was "to return funds to consumers and to determine the amount of the claims that the consumers have against this estate," the bankruptcy court concluded that "to allow that type of recovery to be pursued outside of [bankruptcy] is just fundamentally in violation of the stay." (Id.) Therefore, since the Division had failed to file a motion for relief from the

automatic stay and/or for abstention, the bankruptcy court granted debtor/Nanticoke's motion to enforce the automatic stay.

4. **Issue Presented.** The issue before this court on appeal is whether the Division's claims for restitution in its enforcement action constitute an exercise of its police and regulatory powers subject to 11 U.S.C. § 362(b)(4), which section provides that the automatic stay provision of § 362(a) is not applicable to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."

5. **Analysis.** Courts that have addressed the above issue have recognized the tension that exists between the goals of §§ 362(a) and 362(b)(4). The United States Court of Appeals for the Third Circuit, for example, has noted that the automatic stay provision codified at § 362(a) serves two purposes: (1) "[P]roviding the debtor with a 'breathing spell';" and (2) [R]eplac[ing] an unfair race to the courthouse with an orderly liquidation procedure designed to treat all creditors equally." United States v. Nicolet, Inc., 857 F.2d 202, 207 (3d Cir. 1988). Recognizing, however, "that the stay provision was particularly vulnerable to abuse by debtors improperly seeking refuge under the stay in an effort to frustrate necessary governmental functions," Congress enacted the police and regulatory power

exception to the automatic stay. The two pertinent subsections provide:

362(b) The filing of a [bankruptcy petition . . . does **not** operate as a stay -

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

The House Report explained the above exceptions by stating:

Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

H.R.Rep. No. 95-595, at 343 (1977), reprinted in 1978

U.S.C.C.A.N. 5963, 6299. As characterized by the Third Circuit in Nicolet, these provisions embody Congress' recognition that enforcement of actions to protect the public health and safety "merits a higher priority than the debtor's rights to a 'cease fire' or the creditors' rights to an orderly administration of the estate." 857 F.2d at 207.

6. **Conclusion.** While the bankruptcy court's decision was a rational one based on generally accepted legal principles,

nevertheless, the court concludes that "[a] reading of the legislative history clearly favors the government's position," a conclusion supported by the caselaw cited by the parties.<sup>2</sup> The Division's enforcement action was not intended to protect the government's interest in the debtor's property, but related to matters of public safety and welfare and was intended to effectuate public policy. Therefore, the decision of the bankruptcy court is hereby reversed and the matter remanded to that court for further proceedings.<sup>3</sup>

Sue L. Robinson  
United States District Judge

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<sup>2</sup>In addition to the Third Circuit's decision in Nicolet, see also In re First Alliance Mortgage Co., 264 B.R. 634 (C.D. Cal. 2001); In re Luskin's Inc., 213 B.R. 107 (D. Md. 1997).

<sup>3</sup>The court notes in this regard that, given the statutory exception to enforcement of the automatic stay, it was not incumbent on the Division to file a motion to lift the automatic stay. The court further notes that the exception extends "to permit the **entry** of a money judgment, but does not extend to permit **enforcement** of a money judgment." Nicolet, 857 F.2d at 208 (emphasis added).